

04773

**EB Docket No. 04-381**

# MEMORANDUM OPINION AND ORDER

**Released: October 12, 2005**

## Preliminary Statement

1. This is a ruling on Complainants' Motion To Dismiss filed on August 1, 2005. In opposition, Gulf Power Company ("Gulf Power") filed Gulf Power's Response To Complainants' Motion To Dismiss on August 29, 2005. Complainants' Reply To Gulf Power's Response To Complainants' Motion To Dismiss was filed on September 6, 2005. Response Of The Enforcement Bureau To Complainants' Motion To Dismiss was filed on September 7, 2005.<sup>1</sup>

## Background

2. Cable company members of Florida Cable Telecommunications Association, Inc. *et al.* (“Complainants”) provide cable television (“CATV”) to subscribers in Florida. In providing the service, Complainants must attach cable to utility poles. Gulf Powers’ utility poles are used for that purpose. Gulf Power charges

<sup>1</sup> The Bureau advised that it reviewed the pleadings of Complainants and Gulf Power, and believes that the pleadings discuss all relevant issues raised in the Complainants' Motion.

Complainants a fee based on a formula ("Cable Formula") set by the Commission pursuant to the Communications Act. 47 U.S.C. § 224; 47 C.F.R. § 1.1409(b). Under the Cable Formula, Gulf Power is entitled to charge for make ready and all other "marginal costs." Gulf Power contends that the Cable Formula provides inadequate compensation for Complainants' use of poles that are at "full capacity" and/or "crowded." Therefore, Gulf Power argues that under the Fifth Amendment to the United States Constitution, Gulf Power is entitled to "just compensation," and that "an alternative cost methodology should be employed in order to arrive at an appropriate pole attachment rate."

### Issues and Burdens

3. This formal hearing commenced on September 27, 2004, when the Enforcement Bureau ("Bureau"), by delegation, issued *Hearing Designation Order*, EB Docket No. 04-381 (DA 04-3048) ("*HDO*"). See *HDO* at Para. 2. Gulf Power has the burden of proceeding with the evidence and the burden of proof (preponderance of the evidence) on the issue:

Whether Gulf Power is entitled to receive compensation above marginal costs for any attachments to its poles belonging to the Cable Operators, and, if so, the amount of any such compensation.

*HDO* at Para. 11. Gulf Power is in the process of assembling the evidence it will offer at hearing. Complainants are engaged in discovering such evidence.<sup>2</sup>

4. In its Motion to Dismiss, Complainants contend that based on status of discovery to date, Gulf Power cannot meet the evidentiary requirements for a takings claim of "just compensation" for cable attachments on Gulf Power poles. Complainants may argue sufficiency of evidence, but Complainants cannot set the standard and cannot be the final arbiter of sufficiency. The standard of evidence that Gulf Power must meet was set in the case of *Alabama Power v. F.C.C.*, 311 F.3d 1357 (11<sup>th</sup> Cir. 2002). For purposes of this hearing, the Eleventh Circuit's standard was recognized by the Bureau as the controlling standard for adjudicating Gulf Power's entitlement to any "damages" beyond the Cable Formula. See *Florida Cable Telecommunications, Inc., et. al. v. Gulf Power Company*, Memorandum Opinion and Order, 18 FCC Rcd 9599 (Enf. Bur. 2003) ("*Gulf Power Order*").

---

<sup>2</sup> The parties are also engaged in extensive motions practice seeking to compel additional information. See *Discovery Order*, FCC 05M-38, released August 5, 2005, and *Second Discovery Order* FCC 05M-44, released September 22, 2005. A Third Motion to Compel was served by Complainants on October 7, 2005. See also *Order* FCC 05M-50 at fn. 1, released October 12, 2005 (courtesy copy provided).

5. The *Gulf Power Order* adopts the Eleventh Circuit's evidentiary standard that a utility pole owner is entitled only to marginal costs unless it can show:

[W]ith regard to each pole that (1) the pole is at full capacity and (2) either (a) another buyer of the space is waiting in the wings or (b) the power company is able to put the space to a higher-valued use with its own operations.

Without such proof, any implementation of the Cable Rate (which provides for much more than marginal cost) necessarily provides just compensation.

*Gulf Power Order*, 18 FCC Rcd at 9607, Para. 15, citing *Alabama Power*, 311 F.2d at 1370-71. See also issue for adjudication set in the *HDO* at Para. 3.

#### **Proof of Actual Losses**

6. The "damage" must be shown with respect to each pole for which Gulf Power seeks an annual rate higher than its existing compensation under the Commission's Cable Formula. See *Alabama Power*, 311 F.3d at 1369, holding that "in taking law, just compensation is determined by the loss to the person whose property is taken." The Cable Formula also requires pole users to pay "marginal costs" which include "make-ready costs and all other marginal costs (such as maintenance costs and the opportunity cost if capital devoted to make-ready and maintenance costs) in addition to some portion of fully embedded costs." *Id.* at 1369. Thus, under the Cable Formula, it is intended that an owner of utility poles "will be put into the same position monetarily as it would have occupied if the property had not been taken." *Id.* at 1370. Complainants argue that after reviewing evidence that they have discovered on which Gulf Power will rely, such evidence is believed by Complainants to be insufficient to show an actual loss or specific, quantifiable lost opportunity, or that proves that Gulf Power was out more money as a consequence of Complainants' attachments. These are substantial issues raised by relevant fact evidence that is still forthcoming, and that will be introduced at hearing and analyzed in post hearing findings and conclusions.

#### **Proof of Poles at Full Capacity**

7. Another leg of Complainants' argument for dismissing the case is the allegation that Gulf Power is unable to identify individual poles at "full capacity". Gulf Power is in the process of assembling documentary evidence relevant to determining capacity with respect to individual poles. In addition to internal business documents, Gulf Power has undertaken an outside audit, and has commissioned a consulting firm, Osmose, Inc. ("Osmose"), to make pole by pole determinations of capacity ("full capacity" and/or "crowded").

8. Gulf Power has already submitted a Preliminary Report on Pole Survey dated September 30, 2005, with a Final Report due on October 31, 2005. Gulf Power's Preliminary Report estimates that approximately 150,000 of 235,000 poles in Gulf Power's system are jointly used. As of September 30, there have been 9,663 poles audited and 7,120 of those poles or 73.68% have been identified as "crowded." The Preliminary Report concludes that there are too many "crowded" poles to physically audit the entire system on a pole by pole basis by October 31, 2005. By Gulf Power's extrapolation, the entire system could contain approximately 110,525 "crowded" poles.<sup>3</sup>

9. While Complainants complain that Gulf Power has not and cannot identify individual poles that are at "full capacity," the Osmose audit is still underway and will be completed on October 31, 2005. It is infeasible to attempt to reach ultimate conclusions in this ruling that Gulf Power cannot identify "full capacity" poles and/or "crowded" poles for which it seeks additional rents.

### **Crowded Poles**

10. Complainants are critical of the yet to be completed Osmose audit which was undertaken at Gulf Power's expense to locate and describe poles meeting a definition of "crowded".<sup>4</sup> The statement of work which Osmose agreed to includes a definition of a "crowded pole," and specific measurements were provided. Gulf Power still needs time to complete its audit, to be submitted and furnished to Complainants on October 31, 2005, a date well in advance of the hearing set for March 28, 2006. There also will be depositions of experts on the methodology and results of the completed Osmose audit. Thus, there is significant discovery underway that is to be completed before the close of discovery on December 16, 2005.

---

<sup>3</sup> It is officially noted that there has been hurricane weather in the areas of Florida in which Osmose is conducting the audit. Therefore, Gulf Power may utilize extrapolation from a meaningful sampling in order to submit a timely final report. Reliability of the method of extrapolations will be determined in connection with concluding whether Gulf Power has met its burden of proof.

<sup>4</sup> Complainants have not objected to the commissioning of an audit of Gulf Power's pole system for purposes of evidence in this case. See *Order FCC 04M-41*, released December 15, 2005, reporting on prehearing conference of December 13, 2004. See also *Order FCC 05M-03*, released February 2, 2005 (status report noted that was submitted on pole audit/survey).

11. Gulf Power asserts that it has appropriately defined "crowded" as the equivalent of "full capacity," and argues that there was no decisional distinction drawn by the Eleventh Circuit. See *Alabama Power*, 311 F.3d at 1370 (APCo did not allege its poles were "currently crowded," and therefore it had no claim). Being aware of that decision, Gulf Power asserts that it can show that its poles are "crowded" or at "full capacity," measures which Gulf Power considers to be a distinction without a difference. Gulf Power commits to introducing pole-by-pole evidence of "crowded" or "full capacity" poles. *Id.* Proof will include internal reports, augmented by the Osmose audit, and build-out make-ready work orders. The state of preparation by both parties is about as it would be expected to be for a case of this complexity at a point six months before hearing. And more importantly, there will be an exchange of cases-in-chief and trial briefs before the hearing which will finalize Gulf Power's order of proof.

### Description of Evidence

12. In support of its request for a hearing, Gulf Power submitted to the Bureau a Description of Evidence that included pole change-outs due to full capacity and evidence of pole change-outs at its expense in order to accommodate its business needs as a utility. The Bureau considered Gulf Power's proffer sufficient to raise substantial issues of fact, and issued the *HDO*. Gulf Power now intends to demonstrate "crowded" or "full capacity" in four ways: (1) the Osmose audit; (2) major build-outs identified in the Description of Evidence; (3) statistical extrapolation from the results of Osmose audit; and (4) system averages in conjunction with FCC presumptions.

13. In challenging the credibility of Gulf Power's Description of Evidence, which it had opposed prior to issuance of the *HDO*, Complainants used interrogatories that are available under the rules of practice to "flush out" evidence of change-outs. Interrogatory No. 24 asked for instances in which Gulf Power refused to change-out a pole; Interrogatory No. 25 asked for steps and procedures involved in a change-out; Interrogatory No. 26 asked for identification of persons involved in developing make-ready procedures.<sup>5</sup> Gulf Power has answered and has supplemented answers to these interrogatories, and also represents that it is producing a witness to testify about change-out procedures. During an examination of documents on May 27-28, Gulf Power represents that it made available for Complainants' review, all documents of pole change-outs. Gulf Power believes that this evidence is being sought to support an argument that

---

<sup>5</sup> Deposition discovery was undertaken by Complainants in Pensacola from September 8, 2005 to September 16, 2005. Deponents included persons from Gulf Power who are "most knowledgeable" regarding, *inter alia*, Complainants pole attachments, poles' capacity, pole counts, make-ready procedures and costs, change-outs and costs, alleged "higher valued uses" of space, marginal costs, lost opportunities, calculating "just compensation," load planning, development plans, and various pleadings filed on questions of evidence sufficiency and cost methodology.

Gulf Power historically has worked with attachers to accommodate their needs in an effort to rebut any evidence of "crowding" on Gulf Power's poles, an ultimate fact which does not appear to be in contention.

14. Gulf Power's Description of Evidence appears to have been an explication prior to the issuance of the *HDO* of the evidence that was accepted by the Bureau as sufficient to issue the *HDO*. Complainants were permitted to oppose the sufficiency of the Description of Evidence. Under the *HDO*, Gulf Power will be held to its Description of Evidence. *HDO* at Para. 5 n. 20. But the reliability of the Description of Evidence can only be determined with an adequate degree of accuracy only after Gulf Power has introduced its case in chief at the hearing, witnesses have testified and have been cross-examined, and the parties have filed proposed findings and conclusions. Therefore, conflicting contentions over sufficiency of Gulf Power's pre-designation Description of Evidence at this stage of discovery and hearing preparation cannot be the basis for a Motion to Dismiss.

### **Buyers in the Wings**

15. Complainants criticize Gulf Power for failing to identify any instance in which there actually was another potential buyer of pole space "waiting in the wings" that could not be accommodated on poles that were at "full capacity." Gulf Power represents that it can show that pole space occupied by Complainants can be put to a "higher valued use." Gulf Power asserts that "crowded = lost opportunity," and argues that in order to receive compensation under a willing buyer test, it is not necessary to produce an actual buyer. Gulf Power contends that the hypothetical willing buyer test was never discarded by the Eleventh Circuit and that in any final analysis, courts (and agencies) do not have the authority to disregard the "willing buyer" test which is a fixture of Fifth Amendment adjudication. In response, Gulf Power represents that it can prove "actual other buyers," and will show pole change-outs made to accommodate a "telecom carrier or other attacher at market rent." Gulf Power intends to introduce such evidence through "make-ready documents and testimony." Gulf Power should be allowed to make its case-in-chief.

16. Gulf Power contends that because it has a legal obligation to accommodate cable attachments, it should not be penalized in making any compensation analysis for expanding capacity to accommodate new attachers. If a change-out is necessary to accommodate a new attacher, the cost can be passed on. Conversely, if Gulf Power is the beneficiary of a change-out, it must absorb the cost itself. It intends to offer multiple occasions of change-outs made to accommodate Gulf Power business. Congress has empowered utility companies to enter the telecommunications business. To foster competition, Congress made mandatory cable access to utility poles. *See Southern Co. v. FCC*, 293 F3d 1338, 1341-42 (11<sup>th</sup> Cir. 2002). This demand for pole space may have created a "higher valued use" for potential buyers. Gulf Power believes that with a tight supply of attachment space, when Gulf Power changed-out a pole occupied by

Complainants in order to host another attacher at market rent, there was an "actual buyer" at a higher price "waiting in the wings." Gulf Power will present this evidence through documents and testimony at the hearing in March 2006.

### Discussion

17. Commission rules do not provide for entertaining a motion to dismiss, and no jurisdictional authority is cited by Complainants for a full dismissal merely on pleadings. There is a provision for motion to delete issues in the Commission rules, but such motions must be filed within fifteen days after a designation order appears in the *Federal Register*. 47 C.F.R. § 1.229(a). Publication of the *HDO* was completed on November 22, 2004, at *Federal Register* Volume 69, Number 224. A motion to dismiss should be subject to the same time limitations as a motion to delete issues. Complainants have not made a showing of timeliness.

18. Complainants' Motion To Dismiss also is akin to a motion for summary decision. Summary decision is appropriate only where "there is no genuine issue of material fact for determination at the hearing." See 47 C.F.R. § 1.251(a)(1). The significant difference between the two motions is the requirement that the absence of a fact issue be shown by affidavit for summary decision. *Id.*<sup>6</sup> If the Motion to Dismiss were to be granted, there would remain unresolved substantial issues of material fact on the alternate issue of "full capacity" and/or "crowded" which were ordered to be resolved pole by pole, under the *HDO*.

19. A complete evidentiary record was contemplated by the *HDO*.

[S]taff deferred ruling on the merits of the [Gulf Power] Petition pending Gulf Power's filing and service of a submission specifying the kinds of evidence it wished to submit for further consideration in response to the *Alabama Power Decision's* standard and explaining the significance of that evidence.

*HDO* at Para. 5. If the Motion to Dismiss were granted, it would effectively moot consideration of evidence described and proffered by Gulf Power that prompted the hearing, and that would be responsive to the exacting evidentiary standard of *Alabama Power* (proof of "full capacity"/"crowding" on pole by pole basis). Furthermore, the evidence described by Gulf Power would not be introduced into the record through

---

<sup>6</sup> Compare also procedures for Declaratory Judgments FRCP 57 and Advisory Committee Notes (involves only an issue of law on undisputed or relatively undisputed facts.) See also *Declaratory Judgments* 28 U.S.C. § 2201 (any federal court may declare the rights of parties seeking such declaration and any declaration has the force and effect of final judgment or decree). There is no similar procedure provided for in the Commission's rules of practice.

sponsoring witnesses; nor would the significance of that evidence be explained by knowledgeable Gulf Power employees and experts; nor would that evidence and testimony be subjected to the crucible of cross-examination. Therefore, a grant of the Motion To Dismiss would be reviewed by the Commission with an incomplete evidentiary record under the *HDO*.

20. The failure to receive, consider and initially decide in this formal hearing evidence described in its Description of Evidence, as augmented by the Osmose audit, also would be *contra* to specific direction of the *HDO*:

*After carefully reviewing the parties' submissions, we conclude that Gulf Power should be afforded the opportunity to present the evidence delineated in its Description of Evidence during a hearing before an Administrative Law Judge.*

*Id.* (Emphasis added.) Also relevant is the Commission's policy that presiding judges not take any action inconsistent with a designation order. *Atlantic Broadcasting Co.*, 5 FCC 2d 717, 720-21. And it makes no difference whether the designation order is issued by the Commission or by delegated authority. *Frank H. Yemm*, 39 Radio Reg. (2d) (P&F) 1657 (1977). Complete dismissal of all issues in the *HDO*, without the Bureau agreeing to such procedure as being in the public interest, and without a showing of cause, would violate that policy.

21. There has not yet been a Commission adjudication on "just compensation" *vis a vis* the *Cable Formula*, which question is set to be considered on-the-record of this case under the standard of proof set by the *Alabama Power* court. Therefore, it is quite possible that the case would be remanded by the Commission to develop an evidentiary record, resulting in a bifurcation of this hearing. It is well settled that the Commission looks with disfavor on the bifurcation of hearing proceedings.

[T]he better procedure, and the one which conforms to established Commission policy, is for the presiding judge to take evidence and to make findings of fact and conclusions of law as to all issues in order to prevent needless remands.

*RKO General, Inc.*, 61 FCC 2d 1062, 1063-64 (1976). There is added concern that bifurcation could lead to an inefficient multiplicity of appeals or judicial review proceedings. *Id.* at 1064. The better and more efficient course of action would be to permit the completion of the hearing as prescribed by the *HDO*, and the issuance of a single initial decision addressing all of the issues in this proceeding, for review by the Commission.



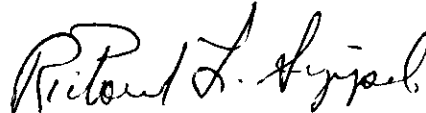
### Conclusion

22. Because of *laches* in filing a motion in the nature of a request to delete issues from a hearing, the lack of authority of the Presiding Judge to take action inconsistent with a hearing designation order, the distinct possibility of remand to develop a full evidentiary record, the Commission's policy against bifurcation of hearing proceedings, and the scope of the documentary evidence, interrogatory discovery and deposition discovery that has been undertaken which raise substantial issues of material fact, there is no basis or authority shown for dismissing the *HDO* on the pleadings without a full hearing on-the-record.

### Ruling

Accordingly, the Motion To Dismiss filed by Florida Cable Telecommunications Association, Inc., *et al.* on August 1, 2005, MUST BE AND IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION<sup>7</sup>

A handwritten signature in black ink, appearing to read "Richard L. Sippel", is centered on the page.

Richard L. Sippel  
Chief Administrative Law Judge

---

<sup>7</sup> Courtesy copies of this *Order* were transmitted to counsel for each of the parties by e-mail on the date of issuance.